IN THE HIGH COURT OF NEW ZEALAND
NELSON REGISTRY

CIV 2016-442-50
[2017] NZHC 2161

UNDER	the Property Law Act 2007
IN THE MATTER	of an application for orders under sections 339 and 343 of the Act
BETWEEN	GLENN RAYMOND HARVEY Plaintiff
AND	DARREN HEEMAN AND DEANNA MARIA HEEMAN Defendants

Hearing: 28-29 August 2017

Counsel: M Keall for Plaintiff
Defendants in Person

Judgment: 7 September 2017

JUDGMENT OF SIMON FRANCE J

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[1] Mr Harvey owned a block of land outside Nelson of approximately 44 hectares (ha). Mr Heeman had been doing some work on it. At some stage he and his wife offered to buy a piece of the land, and in 2002 an agreement was reached for them to do so. The proposal was to divide the land into three titles – Lot 1, the middle block, and what I will call the top block. The Heemans were to have the middle block.

[2] The appropriate consent needed to carry out their plan was obtained. The conditions of the consent were then met and in 2016 three new separate titles were issued. However, because there was an on-going dispute as to where the boundaries should be, the titles to all three blocks were put in all three names. The parties are tenants in common of each, Mr Harvey as to two-thirds, and Mr and Mrs Heeman as

to one third.[1] In this proceeding each party seeks orders under the Property Law Act 2007 in order to finalise the matter.

[3] Mr Harvey seeks an order transferring the titles, as is, into their respective names: Lot 1 and the top block to him, and the middle block to Mr and Mrs Heeman. He also seeks orders directing Mr and Mrs Heeman to pay a sum of money, with interest, to reimburse him for their share of costs incurred.

[4] Mr and Mrs Heeman seek an order directing the boundaries to be redrawn. Currently their middle block is 11 ha in size. Mr Heeman says he bought 15 ha and he wants that much. One and a half ha would come from a specific area of the top block. The other two and a half ha would come either from Lot 1, or also from the top block. As an alternative proposition, Mr Heeman wants at least the specific one and a half ha portion of the top block transferred to the middle block. He says even if the Court does not accept his version of the original bargain, an error was made when the new titles were created and he lost one and half ha that he needs in order to optimise his use of the middle block. Concerning payments, Mr Heeman says he should not have to pay any of the outgoings claimed by Mr Harvey because Mr Heeman did uncompensated work of at least equal value on the subdivision. Mr Heeman also counterclaims for some minor amounts which will be addressed later.

Issue one – was the bargain for 15 ha, or for a specific block of land of whatever size it turned out to be?

[5] Mr Heeman offered to buy a portion of the block of land and Mr Harvey agreed. It is common ground it was to be located where the middle block is, and Mr Harvey would own the land on either side. The parties signed an agreement typed by Mr Harvey. There was then subsequently a formal agreement for sale and purchase entered into but unfortunately that is lost. So what is left is the original agreement and the competing oral arguments.

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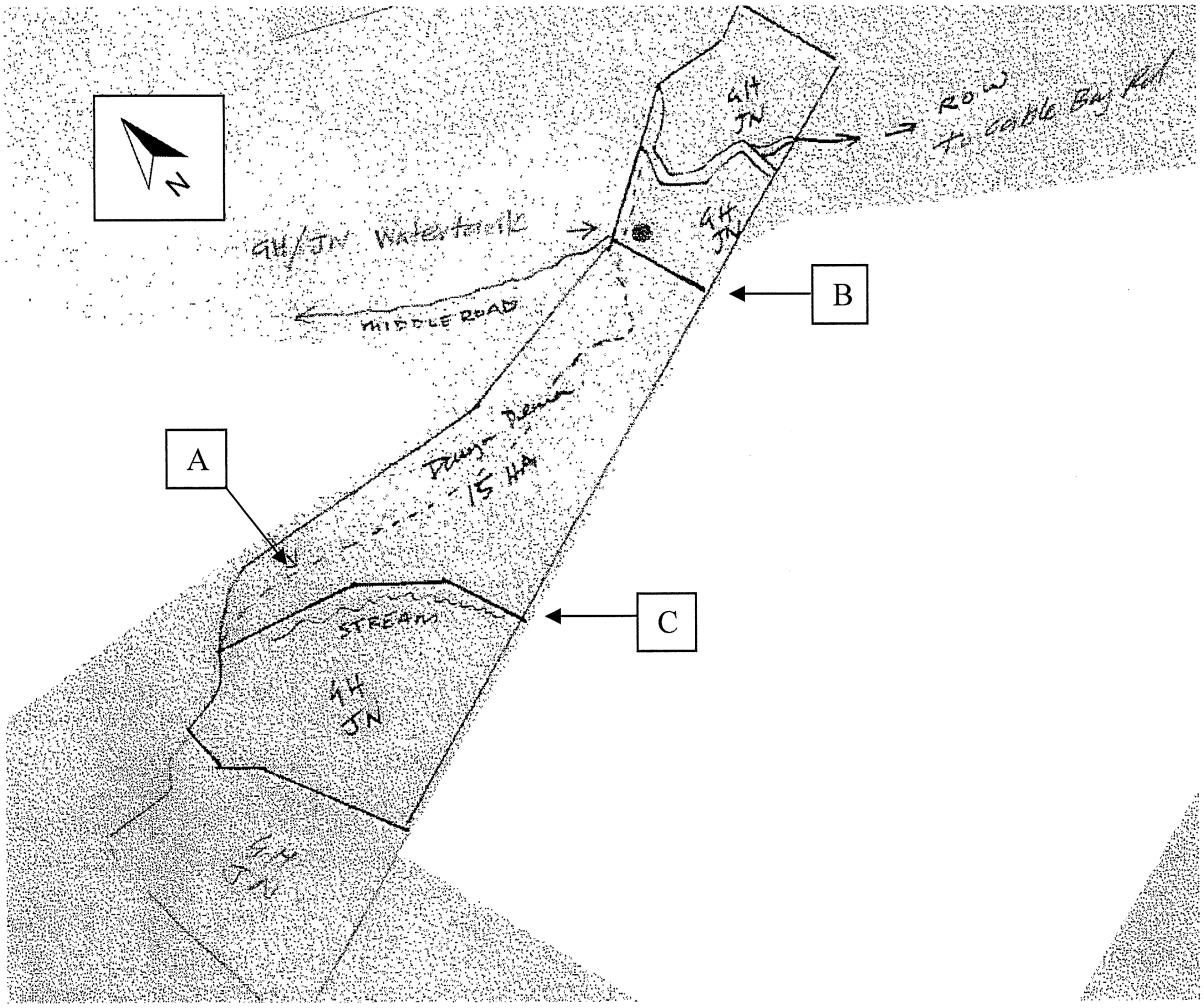
1 As noted the Heeman interests are in the joint names of Mr and Mrs Heeman. However, all the evidence involves only Mr Heeman and so the judgment will generally refer to him.

[6] It is convenient to first set out the relevant extracts from the original agreement:

> That Darryn and Deanna will become shareholders of the land at Kanuka Ridge, and will acquire 15 ha of the land, which will be surveyed in agreement by both parties. This will require 1 peg at the bottom of the new block to form a right angled line to the Anderson boundary, and several pegs at the top of the new block, which will follow the ridgeline above the spring creek to the Anderson boundary. A map is included with this agreement, as attachment 1.



Where the capital letters have been placed, there were handwritten notations on the map which read:

A - - - Represents existing road through Darryn & Deanna's Block – to be used for R.O.W. to top block.

B This boundary is the bottom boundary of Deanna and Darryn's block.

C This boundary line represents a ridgeline above the Springcreek – which is the top boundary of Darryn and Deanna's block of land share.

[7] Mr Harvey says the agreement was always for the identified block of land. Fifteen ha was an estimate of its size but it was recognised it had to be surveyed to confirm that. Mr Harvey says the definition of the border between the middle block and the top block was crucial to him. It is placed on a ridgeline and everything below that was to remain his. This is the land to the east of the border.

[8] Mr Harvey says he made it clear the ridgeline was the key because it ensured the privacy of the top block. Further, the stream that ran below it (on the top block) was "special" to him, as was the planting he had done.

[9] Mr Heeman says the agreement was for 15 ha. He says at the time of the agreement he mentioned the building of an airstrip and needing a portion of the southern part of Mr Harvey's ridgeline to have room to turn the plane. Mr Harvey agrees the airstrip was mentioned but only in the context of needing to move the existing access road from the top where the airstrip would be to the lower part of the middle block. This is what has happened.

[10] I am satisfied that the agreement was for an identified block of land, thought to be as much as 15 ha in size, but delineated by agreed geographical landmarks and ultimately measuring whatever it measured.

[11] First, where there is a clash of evidence I generally accept that of Mr Harvey. It is to be recalled that these events were 15 years ago, and no doubt the respective versions have become fact in the holder's mind. However, my overall preference for Mr Harvey's recollection is global assessment informed by the evidence on all the issues. I considered he was more objective and willing to accept matters contrary to his position. Mr Heeman was rather more fixed in the correctness of his viewpoint. Further, Mr Heeman appears to have a tendency to view facts, or reimagine them, from his perspective. There was a telling example of this in relation to a Council abatement notice. Despite the notice being plain on its face as to the problem it was addressing (Mr Heeman using part of the site as a tip), Mr Heeman seemed convinced it dealt primarily with other issues. He could not accept the obvious.

[12] On this particular issue of the nature of the original agreement, before looking at the documents, I also record I consider Mr Harvey's position to be more realistic. He owned an existing block and was agreeing to pass over a portion. What part would obviously be important to him, and this is reflected in the numerous references to geographical features to set the boundaries. By contrast it was never clear to me why the agreement would be for 15 ha. There is no magic in the figure itself and no reason was suggested why the bargain would be for 15 ha. No one suggested the price of $80,000 was fixed by reference to a hectare value.

[13] Turning to the agreement itself, the first sentence in isolation is the strongest aspect of Mr Heeman's case:

> That Darryn and Deanna will become shareholders of the land at Kanuka Ridge, and will acquire 15 ha of the land...

This passage is preceded by a preamble which says the parties have reached an agreement for the sale of a 15 ha block. Taken on their own these statements say what Mr Heeman contends.

[14] However, there are numerous indicia within the agreement and elsewhere that point the other way. The balance of the clause records:

(a) the block will be surveyed;

(b) the block will be identified by a peg at the bottom (the western boundary) and several pegs at the top (the eastern boundary). (The northern and southern boundaries are fixed by sharing boundaries with neighbours.);

(c) the pegs at the top will follow the ridgeline above the spring creek; and

(d) a map is provided.

There is the emphasis on the ridgeline as constituting the boundary, and a firm effort to identify exactly what is being bought.

[15] Turning to the map the same pattern emerges. On it is written the 15 ha, but there is also a clear description of the land being purchased. The bottom boundary is fixed by reference to the water tank, and is described as the boundary to Darren and Deanna's block. The top boundary is fixed by reference to the ridgeline above the stream, the ridgeline being:

> the top boundary of Darryn and Deanna's block of land share.

[16] So the necessary two new boundaries are clearly fixed. All the parties knew there had been no survey. Everyone therefore must have known there was a real prospect the land would not be exactly 15 ha in size. It could be more or less. If the key was that Mr Heeman get 15 ha, one would expect the agreement to comment on what would happen if it was less. I accept the agreement is drafted by lay people, but the need for such a provision is obvious. If the true bargain is 15 ha, and the block of land on the map only indicative, where would the rest come from if the indicated block was less than 15 ha?

[17] Returning to my credibility finding, the position described in the agreement and map is consistent with Mr Harvey's evidence that the ridgeline, or more particularly what lay on the east of it, was special to him. Mr Harvey has at times sought to sell Lot 1, but not the top block which carries his emotional attachment to the land.

[18] There are other matters that tell against 15 ha being the key component of the agreement. The plan that was submitted several years later with the resource consent application drew Lot 1 as 10 ha, and the Heemans' middle block as 12.5 ha. The plan was prepared on Mr Heeman's instructions and had no input from Mr Harvey. Mr Heeman says these sizings were done because of existing Council requirements that subdivided rural lots had to be at least 15 ha. If a plan was submitted with the middle block as 15 ha, and if the eastern boundary continued to follow the ridgeline, Lot 1 would only be 7.5 ha which may have counted against consent being obtained. Mr Heeman says the drafter told him it would be alright to submit the plans with different sizings because once consent was obtained they can be varied as part of the survey process without needing approval.

[19] Mr Heeman called the drafter, who is more a friend than an acquaintance, as a witness. He was an unimpressive witness and generally I put his evidence to one side but I accept he would have conveyed to Mr Heeman the message Mr Heeman said he received. I observe that, although I accept a subsequent survey will often necessitate variations to the submitted plan, it is an unattractive proposition being advanced here. On Mr Heeman's version the middle block was always going to be 15 ha, one way or the other. I do not consider it proper conduct by either he or the drafter to submit deliberately incorrect plans. Any subsequent variation to the submitted plan was not going to be driven by survey outcomes but by a prior fixed underlying agreement that the plot was actually 15 ha. I emphasise Mr Harvey was not a party to this.

[20] Another feature of the resource consent application is the description given of the middle block (called Lot 2):[2]

> Lot 2 contains the shed and a clearing for a house site with access … It extends *up to a ridge on its upper side* which separates it from Lot 3.

Again it can be seen this is a description of a set boundary delineated by the ridgeline. Consistent with Mr Harvey's position, the middle block is described as extending only up to that ridgeline (not over it which would be the consequence of Mr Heeman's case).

[21] Next, the resource consent was obtained but was issued subject to conditions that needed more work than had been contemplated in 2002. So in June 2009 the parties entered into a new agreement. In this agreement there is reference to the title for the middle block being for land between "12 > 15" ha in size. This is another written indicia signed by Mr Heeman which weighs against his proposition that the deal was for 15 ha.

[22] Mr Heeman's efforts to explain this were confusing. Prior to the hearing it seemed clear that his position was that this was a fictitious agreement created for the purposes of heading off an appeal by neighbours against the granting of the resource consent. Mr Heeman says the idea was to show that commitments had already been

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2 Emphasis added.

entered into on the strength of the consent and therefore leave to appeal should not be given. Mr Harvey denied this and said it was a genuine agreement.

[23] At the hearing I pointed out to Mr Heeman his was an unappealing prospect as it amounted to wilfully misleading a court. Mr Heeman then explained that is not what he meant. Rather, the agreement was real, but was entered into to try and establish prejudice in order to encourage the Environment Court not to give leave to appeal. It was unsuccessful because an appeal was authorised, and that meant, as Mr Heeman saw it, the June 2009 agreement fell away. The appeal was subsequently settled with the addition of a new condition that a bridge be built over a ford, but the extra work and cost that would be involved in that meant the June 2009 agreement was superseded. The "fiction" was for Mr Harvey to now be relying on the agreement.

[24] I am willing to accept this re-explanation although it is a generous conclusion. The pre-hearing documents seemed to make it clear what Mr Heeman was saying and certainly that is the reading both the Court and counsel for Mr Harvey took from it. It was Mr Heeman who had used the word "fiction". But in the end I accept he just expressed it all badly.

[25] That said, if it was a real agreement, as Mr Heeman accepts, then the description of "12 > 15" ha tells firmly against his proposition the agreement was always 15 ha and nothing else. It is a signed acknowledgement to the contrary.

[26] I am accordingly satisfied that the agreement, on its face and supported by other indicia, was for Mr and Mrs Heeman to buy the block of land described in the map attached to the original agreement. The size of the land they were purchasing would be decided by the formal survey whenever undertaken.

Issue two – does the current title to the middle block properly reflect the agreement?

[27] When the survey was done for the purposes of obtaining separate titles, the size of the middle block came in at around 11 ha. Obviously this was a concern to Mr Heeman. However, at the same time the neighbours were indicating they were

about to sell. The parties in this proceeding had agreements with the neighbours about easements and there was concern these would be jeopardised if the titles were not issued. So the parties agreed to obtain the titles in accordance with the survey, but reserving the right to seek boundary changes. This was ensured by putting all the titles in the names of both Mr Harvey and Mr and Mrs Heeman.

[28] Mr Heeman contends that the surveyed land does not reflect the map attached to the original agreement. As one looks at the map, the issue is with the bottom third of the boundary line marked on the original map. Mr Heeman contends the title as issued has this part of the boundary too far to the west, thereby depriving him of two ha. In practical terms it is said to affect the utility of his airstrip although the reason for this seemed to vary between turning areas, access to trees to cut them, and cross winds. Mr Heeman did not file any survey evidence to support his claim of surveying error.

[29] The issue was resolved at trial by an answer given by Mr Heeman in cross-examination. After appearing to dispute it, Mr Heeman accepted the survey plan on which the title is based draws the boundary along the ridgeline as described in the original agreement, in the map and in the resource consent application. Given my conclusion in the previous section concerning the bargain that was struck, that is the end of the matter. The geographical boundaries reflect the bargain and there is no basis to direct any change.[3]

[30] That means I am satisfied that the existing titles are correct and what is needed are orders giving effect to that by removing the names of the other party from each's title.

[31] There is also a caveat lodged against each title by Cotton and Light Ltd. This relates to an unregistered mortgage that Mr and Mrs Heeman gave over their interest in the land in relation to a debt wholly unconnected with this subdivision. There is a dispute between the parties as to whether Mr Harvey agreed to the mortgage. I do

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[3] I note that even absent this admission, the lack of any expert evidence challenging the survey underlying the new title would have meant I did not accept Mr Heeman's case. I note that the drafter who testified commented that it was different. However, he was not called as an expert, would not qualify as one due to independence issues, and generally I did not accept his evidence.

not need to reach a final conclusion. I do, however, observe that objectively it would be a baffling decision by Mr Harvey if he did agree to it, something which makes it less likely that he did. There will be an order directing Mr and Mrs Heeman to discharge the debt to enable the caveat to be removed. Alternatively, Mr Harvey will be authorised to do so, with a supplementary judgment adding that sum to any judgment sum awarded him.

[32] For completeness, I observe that this is an application under s 339 of the Property Law Act, and that s 342 sets out mandatory considerations.[4] Looking at those factors, the reality here is that all co-owners sought the order being made; the difference is that one co-owner, Mr and Mrs Heeman, also sought a further prior order relating to changing the boundaries. That application is being declined. As regards the order I am making, all parties want their interests severed, and are agreed Mr Harvey is to have Lot 1 and the top block and Mr and Mrs Heeman are to have the middle block. The orders reflect the bargain entered into, and contain no element of hardship. The issue of contributions will be dealt with under compensation but does not affect the division orders.

Issue three – compensation flowing either way

Mr Heeman's counterclaim

[33] Mr Heeman claims four amounts that relate to expenses he expects to incur. The second amount is for the cost of a boundary adjustment which will now not be required.

[34] The first and third relate to work he says is needed on the shared access road. I will address this in the context of a fuller discussion of that topic.

[35] The fourth amount is for a retrospective resource consent that Mr Heeman says is required in relation to earthworks he did to obtain the fill for improvements he made to the right of way. Mr Harvey says the need for a retrospective resource consent relates to different earthworks Mr Heeman did on another part of his land for his own benefit. The relevant notice from the Council was not produced. I have no

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4 See [45] of this judgment below.

way to resolve which it is, and so hold that the claim fails as the onus is not discharged. I cannot be satisfied the necessary resource consent is connected to the subdivision. If it were connected then the discussion to follow about the right of way would have been relevant.

[36] Finally, there is a claim for $2,714.50 for money Mr Heeman says he paid on Mr Harvey's behalf that should be reimbursed. There is no other evidence to support this, due perhaps to confusion on Mr Heeman's part as to how to get evidence before the Court in order for it to be considered.[5]

[37] Part of this claimed sum of $2,714.50 relates to work done by Mr Heeman on the bridge. The bridge did not form part of the present case as I am told disputes in relation to it were settled separately following a mediation. I would have been unlikely to reopen the matter.

[38] The remainder of the claim is for a cheque of $1,000 for a subdivision expense written by Mr Harvey to a third party, which cheque Mr Heeman says was dishonoured. For reasons unclear to me it is said the third party sought and obtained the money from Mr Heeman. I am in no position to rule on this. However, the outcome of the case will be that Mr and Mrs Heeman are required to pay a sum of money to Mr Harvey. If Mr Heeman can show that is what happened, then the money should be credited towards that total.

Mr Harvey's claim for compensation

[39] Mr Harvey seeks an order for $62,525.37, being Mr and Mrs Heeman's alleged share of actual outgoings he has incurred on the subdivision. The two bases advanced for this liability are either the 2009 agreement the parties entered into, or the proposition that the Heemans are one third owners of the land, the subdivision was equally for their benefit, and as part of the orders concerning title, they should be directed to pay their share.

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5 Addressed more fully in a minute being released at the same time as this judgment.

[40] Mr Heeman submits the 2009 agreement is no longer on foot. Once the neighbours were authorised to bring an appeal, and once that resulted in the extra need for the parties to construct a bridge over a ford on the access way, the 2009 agreement became redundant. It is submitted that from then on the parties discussed each item that needed doing and made arrangements as to how it would be done. Mr Heeman says:

(a) Mr Harvey offered to pay the various amounts he now claims in order to advance things. (Under the 2009 agreement, most of these were something which Mr Heeman was either to pay totally, or contribute to proportionately.) At the time of doing so, Mr Harvey never said that Mr Heeman remained responsible for a share. Making the payments was for Mr Harvey's benefit to advance matters as Mr Heeman did not have the money and so progress would be slower;

(b) however, it was also the case that Mr Heeman, out of appreciation for what Mr Harvey was doing, said he would do work on the right of way to improve its quality and standard in order to limit the amount of actual concreting needed and to ensure the Council would approve the right of way for the purposes of accepting that the consent conditions had been met.

[41] Mr Harvey accepts he did not expressly say to Mr Heeman that he was still responsible for his share, but neither did he say he was not. Mr Harvey considered, and submits for this case, that the 2009 agreement remained on foot. As for work on the access road Mr Harvey's position is that Mr Heeman just forms his own view of what is needed to make the access road suitable for his purposes. He then does the work and seeks to work out a way to get reimbursed for it. Mr Harvey acknowledges he would have received a lot of texts from Mr Heeman about what Mr Heeman was going to do on the access way to which he did not respond as there was no point. In Mr Harvey's view, Mr Heeman would just go ahead and do what he wanted anyway. He notes that only the concreting was a requirement of the resource consent; the rest was extra done by Mr Heeman.

[42] The first issue is the status of the 2009 agreement. It purported to allocate responsibility for the subdivision work needed in order for titles to issue. It included some work already done by Mr Heeman.[6] The extra condition, namely the bridge over the ford, was not part of the agreement because it came later. It added another layer of cost but did not otherwise alter the matters that needed to be done. There was never any written alteration to the agreement.

[43] It is apparent that Mr Harvey had the financial means to fund all the steps, and Mr Heeman did not. No one suggests there was an oral agreement to scrap the 2009 agreement. It seems rather that the practicalities of the situation meant that all of the fiscal commitments would be met, at least in the interim, by Mr Harvey. Mr Harvey agrees he never set out the basis on which he was making these payments. My factual assessment is that he was himself not clear about the basis and that it was a "wait and see" situation. There is no doubt he was fed up with Mr Heeman and the situation and wanted it finished. If the opportunity to recover funds arose, no doubt he would take it, but I doubt there was any great expectation.

[44] This assessment is supported by the terms of various attempts at negotiating a solution. There does not appear to be anywhere suggestions that payments of the present sort were claimed. One letter refers to these costs but that is the extent of it. Nor was there any specific reference to the 2009 agreement.

[45] Imposing a legal structure upon these practical and informal "variations" to a prior written agreement is not always straight forward. I have come to the view, however, that the extent of the departures from the written agreement, plus the factual reality of new expenses being required for the bridge project, means the 2009 agreement is to be treated as cancelled by implicit mutual agreement. The fact is that to the extent the agreement allocated responsibility for future work and costs, none of it was undertaken in accordance with the agreement which was not referred to at the time the tasks were done. This tells against it still being in force.

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6 Mr Harvey says this was because he wanted it clear there was no money owing by him for that work.

[46] That conclusion means that Mr Harvey's claim for contribution falls to be determined under the provisions of ss 339, 342 and 343 of the Property Law Act, the relevant parts of which provide:

> **339 Court may order division of property**
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> (1) A court may make, in respect of property owned by co-owners, an order—
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> (a) for the sale of the property and the division of the proceeds among the co-owners; or
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> (b) for the division of the property in kind among the co-owners; or
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> (c) requiring 1 or more co-owners to purchase the share in the property of 1 or more other co-owners at a fair and reasonable price.
>
> (2) An order under subsection (1) (and any related order under subsection (4)) may be made—
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> (a) despite anything to the contrary in the Land Transfer Act 1952; but
>
> (b) only if it does not contravene section 340(1); and
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> (c) only on an application made and served in the manner required by or under section 341; and
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> (d) only after having regard to the matters specified in section 342.
>
> (3) Before determining whether to make an order under this section, the court may order the property to be valued and may direct how the cost of the valuation is to be borne.
>
> (4) A court making an order under subsection (1) may, in addition, make a further order specified in section 343.
>
> (5) Unless the court orders otherwise, every co-owner of the property (whether a party to the proceeding or not) is bound by an order under subsection (1) (and by any related order under subsection (4)).
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> ...
>
> **342 Relevant considerations**
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> A court considering whether to make an order under section 339(1) (and any related order under section 339(4)) must have regard to the following:
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> (a) the extent of the share in the property of any co-owner by whom, or in respect of whose estate or interest, the application for the order is made:
>
> (b) the nature and location of the property:
>
> (c) the number of other co-owners and the extent of their shares:
>
> (d) the hardship that would be caused to the applicant by the refusal of the order, in comparison with the hardship that would be caused to any other person by the making of the order:

(e) the value of any contribution made by any co-owner to the cost of improvements to, or the maintenance of, the property:

(f) any other matters the court considers relevant.

...

343 Further powers of court

A further order referred to in section 339(4) is an order that is made in addition to an order under section 339(1) and that does all or any of the following:

(a) requires the payment of compensation by 1 or more co-owners of the property to 1 or more other co-owners:

(b) fixes a reserve price on any sale of the property:

(c) directs how the expenses of any sale or division of the property are to be borne:

(d) directs how the proceeds of any sale of the property, and any interest on the purchase amount, are to be divided or applied:

(e) allows a co-owner, on a sale of the property, to make an offer for it, on any terms the court considers reasonable concerning—

(i) the non-payment of a deposit; or

(ii) the setting-off or accounting for all or part of the purchase price instead of paying it in cash:

(f) requires the payment by any person of a fair occupation rent for all or any part of the property:

(g) provides for, or requires, any other matters or steps the court considers necessary or desirable as a consequence of the making of the order under section 339(1).

[47] Mr Harvey, in terms of s 339(4), seeks an order under s 343 for reimbursement of costs. I do not consider any of s 343(a)–(f) are applicable. Each party will transfer their interest in the others block for $0, and no compensation on the sale is required. What the division orders will mean, however, is that the parties' interest in each other's property is at an end. In that circumstance, s 343(g) is broad enough to allow for orders by the Court to achieve settling up between the parties of outstanding contributions.

[48] The expenses incurred by Mr Harvey are all accepted by Mr Heeman to be reasonable expenses incurred in relation to the subdivision. They all relate to money actually expended by Mr Harvey in bringing about the issue of the three titles. In principle, there can be no reason why Mr and Mrs Heeman should not pay a

proportionate share of the costs. I turn then to assess whether there are fact specific issues that should alter the position.

[49] The first proposition advanced by Mr Heeman is that Mr Harvey agreed to pay costs incurred himself. That is so, but not necessarily in the sense of agreeing to forego any contribution. As noted I consider Mr Harvey probably doubted whether any would be forthcoming, but it goes no further than that. These are expenses Mr Heeman would always have had to pay his share of at some point. I do not consider Mr Harvey gave up his rights to a contribution, nor did he ever say he was doing that.

[50] The real defence for Mr Heeman is that he has done work of equal value on the access way. Mr Heeman listed three handwritten pages of tasks he said he had done. The values attributed to these tasks were a mixture of actual expenses and attributed values for Mr Heeman's endeavour. This is in contrast to Mr Harvey's expenses which are all actual outgoings.

[51] Mr Harvey accepted some of the tasks had been done and said he had no knowledge of the others but did not necessarily deny them. As noted earlier, his position is Mr Harvey would do whatever he thought needed doing. Further, that apart from the concreting they are extras Mr Heeman has chosen to do.

[52] The largest item of expenditure was concreting part of the access way. This was a requirement of the consent once the applicants' proposal to have a route suitable only for four-wheel drive vehicles was rejected. Under Council rules any parts of the track that were over a certain gradient needed concrete.

[53] Mr Harvey seeks 100 per cent contribution from Mr Heeman for the concreting. This is because that is what was agreed in the 2009 agreement which I have held to be cancelled. The evidence left me quite unclear as to why that position had been reached in 2009. In his evidence Mr Harvey referred to the proposition that the access way only needed moving to suit Mr Heeman's airstrip plans, but the evidence is not sufficiently clear as to the extent to which this realignment led to the need for concrete. Given the Council's ruling on the type of vehicle that was to be

accommodated, I am not clear how much concrete the existing track would have needed. In the circumstances, I propose to allocate this expense to the standard two thirds/one third alignment, with two thirds to be paid by Mr Heeman and one third by Mr Harvey.

[54] I do not accept Mr Heeman's proposition that he should not have to pay anything because of the work he did on the access way. That work was, I consider, his choice. The evidence left me satisfied Mr Heeman has views on what is needed for the road, and just does that work. They were not improvements required by the Council. That said I am satisfied there will have been an improvement to the quality of the access, and therefore an unquantifiable increase in values. I will make a modest adjustment for this. However, I reject Mr Heeman's counterclaim in so far as it relates to necessary improvements to the access way. The need for them has not been established.

[55] In terms of the amounts sought by Mr Harvey and listed in Mr Keall's closing, I confirm the following:

(a) legal expenses on subdivision. The sums payable on both the application and the appeal should be combined, and then apportioned two thirds/one third. That may result in a credit to Mr Heeman;

(b) items 2 to 6 as proposed;

(c) items 7 and 8, the reserve contributions should be adjusted to 50/50 as they relate only to the middle and top blocks;

(d) items 9, 12 and 13 – adjust to two thirds/one third;

(e) items 10, 11, 13, 14 and 15 – as proposed;

(f) item 16 – each party encountered legal expenses and should cover their own. Disallowed; and

(g) item 18 – as is.

[56] There will be a sum owing by Mr Heeman. I direct it be adjusted down by 10 per cent to reflect improvements to the access way. I accept the proposal of the plaintiff that the defendants should have two years to pay this sum. Given that Mr Harvey chose to pay the money, and has had the benefit of the subdivision being concluded and titles issued, I decline to order interest on the sum. Finally, I decline at this point to direct the payment of interest on the sum Mr Harvey paid to repay the loan secured by the SBS mortgage. He has been reimbursed the money and I am insufficiently aware of the arrangements to provide for an interest payment at this stage.

[57] The parties will need to recalculate the amount owing in accordance with these decisions, and resubmit the amount for approval.

[58] As with the division order, I note that in making these compensation orders I have had regard to the mandatory considerations in s 343. I have apportioned according to the respective interests. No improper or unfair hardship thereby arises in that each party is bearing a fair share of the costs, and each is getting the titles they originally bargained for. I have made a small allowance for the contribution by Mr Heeman. The credit to be given for this must be limited by recognition that much of the work was done to satisfy his own perception of what was needed, and also recognition that Mr Harvey has made no claim for all his undoubted endeavour. Despite this latter point, I have made a modest recognition because the access way work (such as the culverts) will have resulted in tangible improvements.

Orders

1. Darren and Deanna Heeman are to transfer their interest in ID 686585 and ID 686587 to Glenn Harvey.

2. Glenn Harvey is to transfer his interest in ID 686586 to Darren and Deanna Heeman.

3. Darren and Deanna Heeman are to pay the sum calculated in accordance with paras [54] and [55] to Glenn Harvey within two years of the date of this judgment.

4. Within one month of this judgment Darren and Deanna Heeman are to take all steps necessary to ensure the caveat lodged by Cotton and Light Ltd is removed.

5. If order 4 is not complied with, Mr Harvey is authorised to take those necessary steps. All costs incurred by him in doing so will be payable in full by Darren and Deanna Heeman within two months of Mr Harvey incurring those costs.

6. The transfers are to be done within one month of the step in (4) and (5), unless the parties agree to a different timeframe.

7. For completeness, I direct all parties are to take whatever steps are needed to discharge the existing mortgage to SBS.

8. If either party fails or refuses to undertake any of these steps in accordance with the time set herein, the other is authorised to execute such document(s) for and on behalf of the other co-owner.

[59] Costs memoranda may be filed if required. For Mr Heeman's benefit I indicate that the normal rule is that the losing party, Mr and Mrs Heeman, pay costs to Mr Harvey on a 2B basis as calculated in accordance with the High Court Rules 2016, plus reasonable disbursements to be set by the Registrar if needed.

Simon France J